

October 2, 2007

Issue No.261

Juan C. Araneda

Jennifer A. Becker

David Borovsky

Robert J. Buccieri

Chip Cox

Kim O. Dincel

Kathleen Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Jessica R. MacGregor

Joseph P. McMonigle

Douglas J. Melton

Glen R. Olson

Jordan Rojas

Steven Sharafian

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Seth E. Watkins

Kevin Whittaker

Irene K. Yesowitch

DISQUALIFICATION

California Law

By Jennifer A. Becker

Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395

The Fourth District holds that an attorney who had inadvertent contact with his opponent's expert will not be disqualified if not exposed to confidential information

Brian Riley filed a wrongful death action against Dr. Tania Homonchuk on behalf of Shandralina G. Homonchuk's counsel contacted Dr. Landers, a specialist in pulmonary medicine, to consult on behalf of the defense and imparted confidential information about the case. Shortly before the expert witness designation, Riley contacted Landers to request his services on behalf of Shandralina. Riley identified the names of the parties to determine if there were any conflicts of interest, but Landers failed to recognize or disclose the conflict.

Riley claimed that he spoke only briefly to Landers when he was about to board a plane. Both Landers and Riley claimed that Riley had done most of the talking and that Landers had not expressed any opinions or revealed any confidential information. Subsequently Shandralina disclosed Landers as an expert to opine on the standard of care. When Homonchuk's counsel received the designation he reminded Landers of his prior involvement in the case and informed him that Homonchuk would

seek to disqualify him as an expert. Landers did not immediately respond to these communications, later explaining that he had been on an extended vacation when the contacts occurred. After the doctor filed a motion to disqualify both Landers and Riley, Landers returned the calls and reiterated his willingness and availability to serve as Homonchuk's expert. In the trial court Homonchuk asked the court to infer that confidential information had been communicated by merit of the expert designation and the fact that Landers did not return his counsel's phone calls until after the motion to disqualify was pending.

The trial court granted Homonchuk's motion to disqualify Shandradina's counsel applying a rebuttable presumption that confidential information was exchanged and that inferences that could be drawn that failed to controvert the presumption.

The Court of Appeal noted that rules barring an attorney's representation adverse to a former client when the attorney has obtained material

confidential information apply to nonlawyer agents or employees of the attorney who obtain confidential information and are then hired by a new attorney who undertakes a representation adverse to the client. If the nonlawyer employee actually obtained confidential information from the former client, the court will presume such information was imparted to the new attorney and the new attorney will be disqualified unless the attorney shows the employee has been adequately screened from involvement in the matter so that the confidential information in the employee's possession was not and will not be used or disclosed to the attorney.

If by reason of a consultation with an expert an attorney obtains confidential information protected by the work-product privilege, the attorney can be disqualified since there is no way the offending attorney can separate the work product from case preparation.

In matters of attorney disqualification the client need only show that the former representation has a substantial relationship to the present action to establish a conclusive presumption that that material confidential information material was imparted. In former-employee cases, the moving client must show the former employee actually obtained material confidential information to establish a rebuttable presumption that the former employee used or disclosed the information in the current employment. The burden then shifts to the challenged attorney to prove that he or she has been screened from all involvement in the litigation.

The rebuttable presumption rule applies where an attorney is challenged due to an expert's involvement in both sides of

the same litigation. However, where an expert has contact with two parties, is designated as an expert by the challenged attorney, but remains a consultant to the moving party, the rebuttable presumption does not apply. This is because the expert is still available to the moving party for purposes of presenting evidence and to determine if the expert passed on confidential information to the challenged attorney.

The Court of Appeal concluded that the rebuttable presumption should not have applied because Homonchuk had no legal impediment to obtaining information about the content of the conversation between Landers and Riley, and turned down several invitations to obtain such evidence. Because there was no reason to apply a presumption, it should have been Homonchuk's burden of proof to show that confidential information was imparted to Riley.

The Court would not infer that the expert designation by Shandralina demonstrated that confidential communications occurred in the face of Riley and Lander's explicit denial. Riley explained that Landers was designated due to the imminent disclosure date. Even Homonchuk's counsel conceded that attorneys occasionally designate experts before the expert has expressed an opinion to the designating attorney, because the attorney later has the opportunity to withdraw the designation. As for Lander's failure to immediately respond to Homonchuk's counsel's telephone calls, the Court found that Lander's reasonable explanation for this overcame the conjectural inference that Landers was under the control of Riley.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.

Comment: If an attorney acts ethically in the event of an unanticipated conflict and does not seek or obtain confidential information, courts are inclined to protect the existing attorney-client relationship.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.